Motor Sports International Ltd (Servants or agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-277-94
GOPAL SRI RAM, NH CHAN JJCA AND AHMAD FAIRUZ J
29 MAY 1996

Civil Procedure *— Affidavits — In support of application for ex parte Mareva injunction — Whether met requirements of O 29 r 2A Rules of the High Court 1980 — Whether strict compliance needed — Rules of the High Court 1980 O 29 r 2A*

Civil Procedure *— Injunction — Ex parte Mareva injunction — Restraining defendant from dissipating his assets — Plaintiff claimed exact sum — Whether order must specify upper limit*

Civil Procedure *— Injunction — Ex parte Mareva injunction — Application by defendant to vary order — Judge granted variations — But imposed condition not sought by plaintiff — Whether offended principle governing Mareva judrisdiction*

Civil Procedure *— Appeal — Discretion exercised by trial judge — Interference by appellate court — General principles*

The first appellant was a producer of motor truck shows. On 9 July 1994, the first appellant entered an agreement with the respondent. Pursuant to the agreement, the appellants were to bring into this country several motor trucks belonging to it, as well as the drivers who could demonstrate the versatility of the vehicles at some shows, whilst the respondent would be responsible to promote the shows. Moneys were then collected from members of the public who gained admission to these shows. Later, while the vehicles were still in this country, disputes arose between the parties. The respondent caused to be issued a writ and a statement of claim, claiming several sums, including the tax payable on the sums collected at the shows, from the appellant. The respondent had also obtained an ex parte Mareva injunction ('the injunction') restraining the appellants from dealing in any way with the vehicles and the bank accounts into which the proceeds of the shows had been paid. The appellants responded by making two applications to the court. By the first, they sought to vary the injunction, and by the second, they applied to have the injunction dissolved altogether. In respect of the first summons, the respondent agreed to have the injunction partially varied by consenting to a removal of the restraint over the bank accounts. The judge granted the variations, however, upon a condition that the respondent had never sought, ie that the appellants deposit a sum of RM300,000 within two weeks from the date of the order. The appellants' application to set aside the injunction was refused. The appellants appealed. Counsel for the appellants advanced a number of grounds on which the injunction should be dissolved: (i) the affidavit in support of the ex parte summons on which the respondent obtained the injunction did not comply with the requirements of O 29 r 2A of

the Rules of the High Court 1980; (ii) the ex parte order did not place a monetary limit on the sums frozen in the bank accounts;and (iii) the effect of the judge's order requiring the appellants to deposit a sum of RM300,000 within two weeks was contrary to the purpose of the Mareva jurisdiction as it accorded the respondent priority over other creditors and to place it in the position of a secured creditor. A B

Held, allowing the appeal; setting aside all orders made by the judge, dissolving the injunction and the variation thereof; and ordering the refund of the deposit paid into court by the appellants:

(1) The provisions of O 29 r 2A were introduced by amendment in order to ensure that ex parte injunctions of any sort were granted only in cases where they were truly called for. In order to ensure that the policy behind the introduction of r 2A is not defeated, high courts must demand strict compliance with its terms. More so, when the relief applied for is in the nature of a Mareva or an Anton Piller type of injunction because of the incalculable harm and damage that may be caused to a defendant by the grant of either of these orders (see p 611F–G). C D

(2) Having perused the affidavit in question, this court found that there had not been even a feeble attempt to meet the requirements of r 2A, especially sub-para (d) thereof [which states that affidavit in support shall contain a clear and concise statement of any answer asserted by the defendant (or which he is thought likely to assert) either to the claim in the action or to the claim for interlocutory relief]. On this ground alone, the ex parte injunction ought to have been dissolved by the judge (see pp 611D and H). E F

(3) It is a well established principle governing Mareva injunctions that they ought not to place a restraint upon a defendant more than is absolutely necessary (see p 611I); *Searose Ltd v Seatrain UK Ltd* [1981] 1 WLR 894 followed.

(4) Where a plaintiff claims an exact sum, a Mareva injunction that restrains the defendant from dissipating his assets must specify an upper limit; if it does not, then the order is liable to be condemned as being too wide and therefore oppressive. The remedy of a Mareva is, after all, equitable relief that is granted to ensure that the course of justice is not thwarted. Since equitable considerations are involved, a court should carefully weigh the balance of justice to ensure that any order it makes or any relief it grants in the exercise of its Mareva jurisdiction is not used as an instrument of oppression (see p 612D); *Z Ltd v A-Z & AA-LL* [1982] 1 QB 558 followed. G H

(5) The point of time at which the validity of a Mareva injunction is to be tested is the date of its grant and by reference to its terms as they stood at that date. If such an injunction is oppressive by its terms at the date of its grant, any subsequent variation may merely have the effect of ameliorating the oppression with regard to the future. It does not cleanse the tainted order of the taint which was within it at the time of its grant. Thus, the respondent's I

argument that the restraint upon dealing with the bank accounts was later varied by consent of the respondent was not valid (see p 612F–G).

(6) It was quite wrong for the judge to have imposed the condition in question. There was nothing in his judgment to show that he was alive to the effect which this part of his order would have. It could not be gainsaid that the condition he imposed offended the principles governing the Mareva jurisdiction (see p 613D); *S & F International Ltd v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62 followed.

(7) This court was aware that the orders appealed from were made in the exercise of a discretion vested in the judge, and that this court was not possessed of any original discretion. However, this was a case in which the judge erred in principle. Indeed, the ex parte injunction and the condition imposed by the judge in the variation he granted were contrary to principle and could not be permitted to stand. The present appeal therefore fell within the category of cases in which appellate interference was justified (see p 613E–G).

[Bahasa Malaysia summary

Perayu pertama adalah penerbit pertunjukan-pertunjukan trak bermotor. Pada 9 Julai 1994, perayu pertama mengikat perjanjian dengan penentang. Mengikut perjanjian itu, perayu dikehendaki membawa masuk ke negara ini beberapa trak bermotor kepunyaannya, bersama dengan pemandu yang boleh mendemonstrasikan keserbagunaan kenderaan itu di beberapa pertunjukan, sementara penentang bertanggungjawab untuk mempromosikan pertunjukan itu. Wang kemudiannya telah dikumpulkan daripada orang ramai yang menyaksikan pertunjukan itu. Beberapa lama kemudian, semasa kenderaan itu masih berada di dalam negara ini, berlaku pertikaian di antara pihak-pihak itu. Penentang telah mengeluarkan writ dan pernyataan tuntutan, menuntut beberapa jumlah, termasuk cukai yang kena dibayar di atas jumlah yang dikumpul pada pertunjukan itu, daripada perayu. Penentang juga telah memperolehi injunksi Mareva ex parte ('injunksi tersebut') untuk menyekat perayu daripada berurusan dalam apa-apa cara dengan kenderaan itu dan akaun bank yang mana hasil kutipan pertunjukan itu telah dimasukkan. Perayu bertindakbalas dengan membuat dua permohonan kepada mahkamah. Pertama, perayu memohon untuk mengubah injunksi tersebut, dan kedua, perayu memohon untuk membubarkan injunksi tersebut sama sekali. Berkenaan dengan saman pertama, penentang bersetuju untuk mengubah sebahagian injunksi tersebut dengan penyingkiran sekatan atas akaun bank. Hakim telah membenarkan pengubahan, bagaimanapun, dengan syarat yang tidak pernah dipohon oleh penentang, iaitu bahawa perayu mendepositkan wang sebanyak RM300,000 dalam masa dua minggu daripada tarikh perintah. Permohonan perayu untuk mengetepikan injunksi tersebut telah ditolak. Perayu merayu. Peguam kepada perayu mengemukakan beberapa alasan mengapa injunksi tersebut patut dibubarkan: (i)

afidavit yang menyokong saman ex parte yang digunakan oleh penentang untuk memperolehi injunksi tersebut tidak mematuhi kehendak A 29 k 2A Kaedah-Kaedah Mahkamah Tinggi 1980; (ii) perintah ex parte itu tidak menetapkan had kewangan ke atas jumlah yang dibekukan di dalam akaun bank; dan (iii) kesan daripada perintah hakim menghendaki perayu mendeposit wang sebanyak RM300,000 dalam masa dua minggu adalah bertentangan dengan tujuan bidang kuasa Mareva kerana ia memberikan keutamaan kepada penentang daripada pemiutang-pemiutang lain dan meletakkannya dalam kedudukan pemiutang bercagar.

Diputuskan, membenarkan rayuan; mengenepikan semua perintah yang dibuat oleh hakim, membubarkan injunksi tersebut dan pengubahannya; dan memerintahkan pengembalian wang yang dibayar kepada mahkamah oleh perayu:

(1) Peruntukan-peruntukan A 29 k 2A diperkenalkan melalui pemindaan untuk memastikan bahawa injunksi ex parte dalam apa-apa jenis diberikan hanya dalam kes-kes di mana ianya benar-benar diperlukan. Untuk memastikan polisi di sebalik pengenalan k 2A tidak gagal, mahkamah-mahkamah tinggi mesti menuntut pematuhan yang ketat terhadap terma-termanya. Lebih-lebih lagi, apabila relief yang dipohon ialah dalam bentuk injunksi Mareva atau Anton Piller kerana kerosakan dan kerugian yang tidak terkira banyaknya boleh disebabkan ke atas defendan dengan pemberian mana-mana perintah ini (lihat ms 611F–G).

(2) Setelah membaca dengan teliti afidavit berkenaan, mahkamah ini mendapati bahawa tidak ada sebarang cubaan untuk memenuhi kehendak-kehendak k 2A, terutamanya sub-perenggan (d), [yang menyatakan bahawa afidavit yang menyokong mestilah mengandungi pernyataan yang jelas dan ringkas apa-apa jawapan yang ditegaskan oleh defendan (atau yang difikirkan mungkin akan ditegaskan olehnya) sama ada kepada tuntutan dalam tindakan itu atau kepada tuntutan bagi relief interlokutori]. Atas alasan ini dengan sendirinya, injunksi ex parte tersebut sepatutnya telah dibubarkan oleh hakim (lihat ms 611D dan H).

(3) Adalah satu prinsip mantap yang mengawal injunksi Mareva bahawa ianya tidak sepatutnya meletakkan penyekatan ke atas defendan yang lebih daripada yang benar-benar perlu (lihat ms 611I); *Searose Ltd v Seatrain UK Ltd* [1981] 1 WLR 894 diikut.

(4) Di mana plaintif menuntut jumlah yang tepat, injunksi Mareva yang menyekat defendan daripada melenyapkan asetnya mesti menetapkan had atas; jika tidak, perintah itu boleh dikatakan sebagai terlalu luas dan oleh itu menindas. Lagipun, remedi Mareva ialah relief ekuiti yang diberikan untuk memastikan pelaksanaan keadilan tidak dihalang. Disebabkan relief ekuiti terlibat, mahkamah perlu menimbangkan keadilan dengan berhati-hati untuk memastikan bahawa apa-apa perintah yang dibuat atau apa-apa relief yang diberikan dalam menjalankan bidang kuasa Mareva tidak digunakan sebagai alat untuk penindasan (lihat ms 612D); *Z Ltd v A-Z & AA-LL* [1982] 1 QB 558 diikut.

(5) Masa untuk menguji kesahan injunksi Mareva ialah tarikh pemberiannya dan dengan merujuk kepada terma-termanya yang terdapat pada tarikh itu. Jika injunksi itu menindas dari segi terma-termanya pada tarikh pemberiannya, apa-apa pengubahan selepasnya hanya mempunyai kesan membaiki penindasan berkaitan dengan masa hadapan. Ia tidak membaiki kecacatan yang terdapat dalam perintah pada masa pemberiannya. Oleh itu, hujah penentang bahawa sekatan terhadap urusniaga akaun bank telah diubah atas persetujuan penentang tidak sah (lihat ms 612F–G).

(6) Adalah agak salah untuk hakim itu mengenakan syarat berkenaan. Tidak ada apa-apa dalam penghakimannya untuk menunjukkan bahawa beliau menyedari kesan yang boleh disebabkan oleh perintahnya untuk bahagian ini. Adalah tidak boleh dinafikan bahawa syarat yang dikenakan oleh beliau melanggar prinsip-prinsip yang mengawal bidang kuasa Mareva (lihat ms 613D); *S & F International Ltd v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62 diikut.

(7) Mahkamah menyedari bahawa perintah yang dirayu dibuat dalam pelaksanaan budi bicara yang diletak hak kepada hakim itu, dan bahawa mahkamah ini tidak mempunyai budi bicara asal. Bagaimanapun, ini adalah kes di mana hakim telah melakukan kesalahan prinsip. Malahan, injunksi ex parte dan syarat yang dikenakan oleh hakim dalam pengubahan yang diberikan adalah bertentangan dengan prinsip dan tidak boleh dibenarkan untuk berkuatkuasa. Rayuan ini oleh itu termasuk di dalam kategori kes-kes di mana campur tangan rayuan adalah berjustifikasi (lihat ms 613E–G).]

[*Editorial Note*: The respondent has filed application for leave to appeal to the Federal Court vide Civil Application No 08–79–95.]

Notes

For cases on affidavit, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 176–204.

For cases on injunction, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1425–1725.

For cases on appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259–699.

Cases referred to

Iraqi Ministry of Defence & Ors v Arcepey Shipping Co SA & Anor [1981] QB 65

S & F International Ltd v Trans-Con Engineering Sdn Bhd [1985] 1 MLJ 62

Searose Ltd v Seatrain UK Ltd [1981] 1 WLR 894

Z Ltd v A-Z & AA-LL [1982] 1 QB 65

Legislation referred to

Rules of the High Court 1980 O 29 r 2A

Appeal from: Suit No D5-22-935-94 (High Court, Kuala Lumpur) A

Robert Lazar (Maidzuara Mohamed with him) (Shearn Delamore & Co) for the appellants

Chin Chee Leong (Radhakrishnan & Co) for the respondent

Cur Adv Vult B

Gopal Sri Ram JCA (delivering the judgment of the court): This is a composite appeal against two orders of the High Court at Kuala Lumpur made on two summonses touching upon the same subject matter. By the first order, the learned judge refused an application to discharge an ex C parte Mareva injunction directed against the appellants. By the second, he varied the injunction in question upon the condition that the appellants deposit a sum of RM300,000 within two weeks from the date of the order.

The facts and chronology relevant to the appeal are as follows.

The first appellant is the producer of motor truck shows. It wanted D to stage its shows in Malaysia. For this purpose, it needed someone in this country to organize and to promote the shows. The respondent was identified to carry out this task.

On 9 July 1994, an agreement was entered into between the first appellant and the respondent. One of the recitals to this agreement describes E the respondent as having experience and expertise to organize and promote the shows which the first appellant had in mind. The venture involved the first appellant bringing into this country several motor trucks belonging to it, as well as the drivers who could demonstrate the versatility of the vehicles at the planned shows. F

Pursuant to the aforesaid agreement, the appellants brought the vehicles in question into this country and held performances which were promoted by the respondent. Moneys were collected from members of the public who gained admission to these shows.

Later, while the vehicles were still in this country, disputes arose G between the parties. The respondent then caused to be issued a writ and a statement of claim on 8 November 1994, claiming several sums, including the tax payable on the sums collected at the performances. On the same day, the respondent took out an ex parte summons and obtained a Mareva injunction restraining the appellants from dealing in any way with the H vehicles in question (which were then in Labuan) and from dealing with the bank accounts into which the proceeds of the shows had been paid.

The appellants then took out two summonses. By the first, they sought to vary the order of 8 November 1994, and by the second, they applied to have the injunction dissolved altogether. In respect of the first I summons, the respondent agreed to have the injunction partially varied by consenting to a removal of the restraint over the bank accounts. The learned judge granted the other variations sought but, as earlier observed, also directed the appellants to deposit a sum of RM300,000 in court,

A although the respondent had not sought the imposition of such a requirement. Simultaneously, the learned judge dismissed the appellants' application to set aside the injunction.

Before us, Encik Robert Lazar who appeared for the appellants advanced a number of grounds on which the injunction should be dissolved.
B However we find it necessary to deal with only three of them.

First, he submitted that the affidavit in support of the ex parte summons on which the respondent obtained the injunction did not comply with the requirements of O 29 r 2A. For completeness, we reproduce that rule below:

C (2A) The affidavit in support shall contain a clear and concise statement:

(a) of the facts giving rise to the claim against the defendant in the proceedings;

(b) of the facts giving rise to the claim for the interlocutory relief;

(c) of the facts relied on as justifying application *ex parte*, including
D details of any notice given to the defendant or, if none has been given, the reason for giving none;

(d) of any answer asserted by the defendant (or which he is thought likely to assert) either to the claim in the action or to the claim for interlocutory relief;

(e) of any facts known to the applicant which might lead the Court
E not to grant relief *ex-parte*;

(f) of whether any previous similar *ex-parte* application has been made to any other Judge, and if so, the order made in that previous application; and

(g) of the precise relief sought.

F The provisions of O 29 r 2A were introduced by amendment in order to ensure that ex parte injunctions of any sort were not granted willy-nilly, but only in cases where they were truly called for. In order to ensure that the policy behind the introduction of r 2A is not defeated, high courts must demand strict compliance with its terms. More so, when the relief
G applied for is in the nature of a Mareva or an Anton Piller type of injunction because of the incalculable harm and damage that may be caused to a defendant by the grant of either of these orders.

Having perused the affidavit in question, we find that there has not been even a feeble attempt to meet the requirements of r 2A, especially
H sub-paragraph (d) thereof. On this ground alone, the ex parte injunction ought to have been dissolved by the learned judge.

Second, counsel for the appellants has drawn our attention to the fact that the ex parte order did not place a monetary limit on the sums frozen in the bank accounts.

I Now, it is a well established principle governing Mareva injunctions that they ought not to place a restraint upon a defendant more than is absolutely necessary (see *Searose Ltd v Seatrain UK Ltd* [1981] 1 WLR 894 at p 897, per Robert Goff J). In a case such as the present, where the

amount of the claim has been quantified, it is necessary for the order of court to sufficiently identify the upper limit of the sum that is sought to be protected by the injunction. As Lord Denning observed in *Z Ltd v A-Z & AA-LL* [1982] 1 QB 558 at p 576:

> In other cases, however, it may still be desirable to insert a maximum amount in the general injunction as against the defendant himself. But, as this is unworkable against a bank, it would at the same time be desirable to add a special injunction restraining the defendant from disposing of any of the sums standing to the credit of the defendant in a specified bank account in excess of the maximum: or from disposing of any item deposited with the specified bank for safe custody. The reason being that every bank or other innocent third party should know exactly what it should or should not do.

Also see, *Iraqi Ministry of Defence & Ors v Arcepey Shipping Co SA & Anor* [1981] QB 65.

In our judgment, where a plaintiff claims an exact sum, a Mareva injunction that restrains the defendant from dissipating his assets must specify an upper limit; if it does not, then the order is liable to be condemned as being too wide and therefore oppressive. The remedy of a Mareva is, after all, equitable relief that is granted to ensure that the course of justice is not thwarted. Since equitable considerations are involved, a court should carefully weigh the balance of justice to ensure that any order it makes or any relief it grants in the exercise of its Mareva jurisdiction is not used as an instrument of oppression.

Encik Chin Chee Leong, who appeared for the respondent, argued that although the upper limit rule was not observed in the present case, no harm was occasioned, because the restraint upon dealing with the bank accounts was later varied by consent. With respect, we do not see this as being a satisfactory answer to the point made by Encik Lazar. The point of time at which the validity of a Mareva injunction is to be tested is the date of its grant and by reference to its terms as they stood at that date. If such an injunction is oppressive by its terms at the date of its grant, any subsequent variation may merely have the effect of ameliorating the oppression with regard to the future. It does not cleanse the tainted order of the taint which was within it at the time of its grant. In the circumstances, we are in agreement with the argument advanced on the appellants' behalf.

Third and lastly, Encik Lazar criticized the learned judge's order, made *suo motu*, requiring the appellants to deposit a sum of RM300,000 within two weeks from the date of his order. He argued that the effect of the judge's order was to accord the respondent priority over other creditors and to place it in the position of a secured creditor. This, he said, was contrary to the purpose of the Mareva jurisdiction.

In support of his argument, counsel cited the following passage in the judgment of Abdoolcader FJ in *S & F International Ltd v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62:

> It might perhaps be convenient at this stage to concisely perpend the principles and policy underlying a Mareva order elucidated in a chain of related cases of which we need only refer to three. In *PCW (Underwriting Agencies) Ltd v Dixon & Anor* [1983] 2 All ER 158 which sets out the policy

underlying the Mareva jurisdiction, it was held that the sole purpose of a Mareva injunction was to prevent a plaintiff being cheated out of the proceeds of an action, should he be successful, by a defendant transferring his assets abroad or dissipating his assets within the jurisdiction, and that the remedy was not intended to give a plaintiff priority over those assets, or to prevent a defendant from paying his debts as they fell due, or to punish him for his alleged misdeeds, or to enable a plaintiff to exert pressure on him to settle an action. This decision of Lloyd J went on appeal to the Court of Appeal ([1983] 2 All ER 697) which however did not deliver a judgment but by consent allowed the appeal and varied the Judge's order, but the principles enunciated by Lloyd J, were unaffected by the consensual variation made in the light of the factual circumstances of that case. The English Court of Appeal has also held in *Campbell Mussells & Ors v Thompson & Anor*, The Times, 30 May 1984 that a Mareva injunction was never intended to put a plaintiff in the position of a secured creditor and every case had to be dealt with on its own merits.

We are in agreement with Encik Lazar. In our judgment, it was quite wrong for the learned judge to have imposed the condition in question. There is nothing in his judgment to show that he was alive to the effect which this part of his order would have. It cannot be gainsaid that the condition he imposed offended the principles governing the mareva jurisdiction.

The principles governing an appeal such as this are in the forefront of our minds. We are aware that the orders appealed from were made in the exercise of a discretion vested in the learned judge. This court, in an appeal such as this, is not possessed of any original discretion. Its initial function is one of review only. It is only after an appellant has demonstrated that the judge to whom the law entrusts the original discretion has erred in principle, or has taken into account an irrelevant consideration, or has failed to take into account a relevant consideration when arriving at his decision, or that the order made has caused an injustice, that this court becomes entitled to exercise an original discretion.

Having given this matter careful consideration, we came to the conclusion that, for the reasons given in this judgment, this is a case in which the learned judge erred in principle. Indeed, the ex parte injunction and the condition imposed by the learned judge in the variation he granted were contrary to principle and cannot be permitted to stand. The present appeal therefore falls within the category of cases in which appellate interference is justified.

Accordingly, the appeal was allowed with costs. All orders made by the learned judge were set aside. The ex parte injunction and the variation thereof were dissolved. The deposit paid into court by the appellants was ordered to be refunded to them. The appellants were also awarded the costs of the proceedings in the court below.

Order accordingly.

Reported by Isabel Liong